IN THE

Supreme Court of the United States.

October Term, 1904.

THE UNITED STATES, *Appellant*,
v.
ALBERT C. ENGARD. } No. 136.

BRIEF FOR APPELLEE.

Statement of Case.

The appellee claimed in the Court of Claims the difference between sea and shore pay as Chief Engineer in the navy. The facts, stated in the findings of fact (rec. pp. 3, 4), may be summarized as follows:

On February 11, 1897, the claimant was performing duty on the United States Receiving Ship *Richmond* at League Island, Pa. That was sea duty under the decisions of this court in *United States* v. *Symonds* (120 U. S. 46), and *United States* v. *Strong* (125 U. S. 656). He was on that date ordered to perform "temporary duty" in the inspection of boiler tubes at Findlay and Shelby, Ohio, and authorized to travel as necessary between League Island and these points. The order closes with these words: "This duty is in addition to your present duties." He was not detached from the *Richmond*. He made two inspection trips, from February 24 to April 27, and from June 15 to August 14, 1897.

The Treasury Department allowed him only shore pay

during these two periods of temporary absence from his vessel.

The Court of Claims decided that he is entitled to sea pay and gave judgment accordingly, 38 C. Cls. 712.

Statutes.

The statutes relating to this subject are the following:

Revised Statutes, § 1556:

"The commissioned officers and warrant officers on the active list of the Navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employes in the Navy, shall be entitled to receive annual pay at the rates herein stated after their respective designations: * * *

"Chief engineers * * * during the second five years after date of commission, when at sea, three thousand two hundred dollars; on shore duty, two thousand eight hundred dollars; * * *."

Revised Statutes, § 1571:

"No service shall be regarded as sea service except such as shall be performed at sea, under the orders of a Department and in vessels employed by authority of law."

Regulations.

The Naval Regulations of 1896, bearing on this subject, are the following:

Paragraph 1154:

"(1) Officers shall be entitled to sea pay while attached to and serving on board of any ship in commission under the control of the Navy Department, the Coast Survey, or the Fish Commission. * * *

"(3) An officer temporarily absent from a ship in commission to which he is attached, shall continue to receive sea pay."

Paragraph 1168:

"A temporary leave of absence does not detatch an officer from duty nor affect his rate of pay."

The Issue of Law.

The only question in this case is whether a naval officer on sea duty is entitled to sea or shore pay when, in addition to his sea duties, he is ordered to temporary duty on shore. By the Naval Regulations (Par. 1154 quoted), an officer thus temporarily absent from his ship continues to draw sea pay. The Court of Claims says of this (rec. 5):

"The regulations of a department can not make the law or change it, but the head of a department, by general regulations, can interpret the law for the benefit of his subordinates and give to it practical application."

It rests upon the United States to show that this regulation is contrary to law.

It is not within the intent of the law to take away from an officer the right to sea pay merely for a brief period, when he is given additional duty requiring him temporarily on shore. The argument is fully stated in the opinion of the court (rec. 4.):

"The plain purpose of Congress is that the Government shall pay more where the officer renders more. Service on shipboard involves the breaking up of arrangements for living on shore; separation from family and friends; increased expenses and expenditures; increased hardships and duties; and many personal restrictions. The invariable questions which have been asked in doubtful cases have been, 'Was the officer deprived of the ease and comfort and economies of shore duty?' 'Did the service to which he was assigned require the sacrifice and discomforts and expenses of a life at sea?' If it did, he was entitled, within the legislative intent, to be considered on duty in a ship at sea; if it did not, he was entitled to no more than the pay of an officer on shore duty.

"It is also well settled as the Navy Regulations and the action of the accounting officers and the decisions of the court can make it that the sea pay of an officer does not

stop every time he sets his foot upon the shore (Collins's case, 37 C. Cls. R. 222). There is a difference between 'shore duty' and duty on shore. It would be a monstrous perversion of the legislative purpose to say that the officers of a naval force landed to assault an enemy's land batteries, or to protect a town, or to guard a consulate, or to bring off wood or water or provisions are in return for extra and hazardous service to be cut down in their pay."

An officer sent temporarily to hospital without detachment from his vessel, is held even by the Treasury Department entitled to sea pay. The Comptroller decided (2 Comp. Dec. 299):

"It would be absurd to hold that every time an officer was compelled by ill health to go into hospital for temporary treatment he is thereby detached from the service to which he had been ordered by the Secretary. It rests with the Secretary to so detach him and place him upon 'leave or waiting orders.' * * *

"Illness is an incident to any kind of service, and while the rate of pay provided in section 1556, Revised Statutes, is dependent upon the character of the service performed irrespective of naval regulations or orders in contravention thereto (*United States* v. *Symonds, supra*), yet in my opinion illness alone can not alter the character of the service, and consequently the pay attached thereto under the provisions of this section."

That decision in its application to temporary absence on account of illness has been followed by the Court of Claims in *Collins* v. *United States* (37 C. Cls. 222), where the court says (p. 225):

"The claimant was attached to a vessel employed by authority of law, and while serving at sea, in the line of duty, received a gunshot wound which necessitated his removal to the hospital; and while he was ordered to the hospital he was not detached from his vessel, so that he was temporarily absent, not on his own motion, but by reason of the misfortune incurred in the line of duty.

"This class of cases was sought to be met by paragraph 1154 of the navy regulations (1896) wherein, among other things, it is provided:

"'An officer temporarily absent from a ship in commission to which he is attached shall continue to receive sea pay.'

"We do not believe the regulation contravenes the statute, as construed in the *Symonds* case, so long as the officer is attached to a vessel—in commission—to which he owes service.

"The status of the ship must determine the right of the officer attached thereto. That is to say, if a ship to which an officer is attached is in commission—performing sea service—his temporary absence therefrom, by authority, as in this case, will not deprive him of his right to sea pay."

This admission by the Comptroller of the Treasury, the executive officer charged with the primary decision of the liability of the United States, is entitled to great weight, both as showing the settled executive practice and as an admission by an officer whose duty in the determination of the liabilities of the United States must always require him in cases of substantial doubt to decide with the Government. If an officer temporarily absent from his vessel in hospital is entitled to sea pay during his absence, so much the more is sea pay due to an officer whose responsibilities as an officer of a vessel continue while he has, in addition to these, other duties ashore.

For the reasons given in the opinion of the Court of Claims the judgment should be affirmed.

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